

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0019.2018
(On Appeal from Court of Appeal No: AAU 0045.2014)

BETWEEN : **DEVENDRA NAICKER**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : Mr. A. K. Singh for the Petitioner
Mr. A. Jack for the Respondent

Date of Hearing : 19 October 2018

Date of Judgment : 1 November 2018

JUDGMENT

Marsoof J:

1. I have had the opportunity of perusing in draft the Judgment of Keith J, and I agree with his reasoning and conclusions. I also agree with the order proposed by him.

Ekanayake J:

2. I have read the judgment of Keith J in draft, and I agree with his reasoning and conclusions.

Keith J:**Introduction**

3. It is sometimes said that circumstantial evidence is less compelling than direct evidence. What better evidence can there be than that someone saw the defendant commit the crime he is accused of? But eye witnesses can sometimes be mistaken, and they have also been known to lie. That is why it is also said that circumstantial evidence can be just as compelling, if not more so. If I go to bed at night and the ground outside is dry, and I wake up in the morning to find that it is wet – true, I have not actually seen it rain, but the inference that it rained during the night is irresistible. As long ago as 1866, 8 years before Fiji became a Crown Colony, a distinguished judge likened circumstantial evidence to a rope comprised of several chords. He said that “[o]ne strand of the chord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”¹ One of the issues in this case is whether the circumstantial evidence was sufficient to justify the conviction of the petitioner for murder.
4. The petitioner is Devendra Naicker. I trust that I shall be forgiven for referring to him (as well as to other persons referred to in this judgment) by their family names from now on for convenience. He was charged with murder. All three assessors expressed the opinion that he was guilty. The trial judge (Kumararatnam J) agreed and accordingly convicted him of murder. He was sentenced to life imprisonment, and the judge directed that Naicker would have to serve 20 years in prison before he would be eligible to request the Mercy Commission to recommend a pardon.
5. Naicker applied to the Court of Appeal for leave to appeal against both his conviction and sentence. The single judge granted Naicker leave to appeal against both his conviction and that part of his sentence which related to the length of time he had to spend in prison before a pardon could be considered. In due course, the Court of Appeal (Calanchini P, Chandra JA and Bandara JA) dismissed the appeal against conviction, but allowed the

¹ Pollock CB in *Exall* (1866) 4 F & F 922 at p 929.

appeal against sentence. It directed that Naicker would have to serve 13 years in prison before he would be eligible to request the Mercy Commission to recommend a pardon. Naicker now applies to the Supreme Court for special leave to appeal against his conviction. This is the Supreme Court's judgment following the hearing of that petition. All dates in this judgment are in 2011 unless otherwise stated.

The facts

6. The deceased was Bishal Anand Mishra. He was a taxi driver, and there was uncontested evidence that on the day of the murder – 20 December – Naicker was looking for him. According to Mishra's brother, Mishra had said that Naicker had asked Mishra to drop him off at Korociriciri. Other witnesses put Naicker at a taxi base in Nausori late that afternoon, and saw Naicker and Mishra leave the taxi base together in Mishra's taxi. One witness put that at about 6.20 pm, another put it at about 6.45 pm, but nothing turns on that. None of that was disputed. It was the last time when Mishra was seen alive in Nausori.
7. The scene shifts to Korociriciri, a hamlet not far from Nausori. The evidence of a local farmer whose farm was in Korociriciri but whose home was nearby in Waituri said that as he was cycling home on the day in question he saw a taxi near the Waituri roundabout. There were two men inside. One was the driver and the other was in the back on the nearside. The driver was looking at the other man who was facing down. The farmer put the time at about 6.00 pm, but it was not something he was sure about.
8. The really important evidence came from the next two witnesses: Tevita Naqaruqaru and Ratu Meli Draunimasi. Naqaruqara lived in Waituri. His evidence was that at about 6.30 pm on the day in question he was at his home with Draunimasi when he heard a car being driven fast along the road outside. It was unusual for cars to be driven at speed on that road as it was dilapidated. He and Draunimasi went outside. They saw that the car had stopped. An Indian man – Naicker is of Indian ethnicity – got out and ran off. They chased him, and the man threw something into a bush. Naqaruqara stopped to see what it

was while Draunimasi continued to chase the man. He could not find whatever the man had thrown, so he followed Draunimasi. He saw the man throw away the trousers he was wearing. By the time Naqaruqara reached Draunimasi, Draunimasi had caught the man who was crying and kneeling in front of Draunimasi. He stayed like that for about 20 minutes.

9. Draunimasi confirmed Naqaruqara's evidence broadly speaking. After Naqaruqara had stopped to look for whatever the man had thrown away, Draunamisi had continued to chase the man. He eventually caught the man up, and they were talking, he thought, for about 15 minutes before they let the man go. He had blood on both his hands, with some money in one of them, and he claimed that he had agreed to buy a goat from two men of Fijian ethnicity, and they were now looking for him. Draunimasi's evidence was that he felt sorry for the man, so after counting the money the man had (which came to \$30) he let the man go. The man retrieved his trousers which were also stained with blood and headed off towards the old bridge at Korociriciri.
10. Later that day, Mishra's body was found near Waituri Irrigation. He had been stabbed. The evidence of the pathologist who carried out the *post mortem* was that there were 5 wounds on Mishra's face and chin, and another 10 wounds on his body, 9 of which were wounds which connected to organs which "communicate[d] with the thoracic cavity". As I read the judge's note of his evidence, he thought that Mishra had been attacked from behind. The body was about 200 metres from where his abandoned taxi had been. There were bloodstains found in the taxi, but there was no forensic evidence – whether of blood type or DNA – linking those stains either to Mishra or Naicker. No fingerprints were found in the taxi, let alone ones which were capable of placing Naicker in it. Naicker was arrested on the following day, 21 December.
11. I shall come in due course to what Naicker was alleged to have told a doctor who examined him, and what he was alleged to have told the police when they interviewed him under caution. But Naicker elected to give evidence at his trial. The account he gave was that on the day in question he had got into the back of Mishra's taxi, and they had driven

from Nausori to Korociriciri. Mishra had dropped him off there. Naicker claimed that he had then gone home, changed and then gone to a creek. One of his friends was fishing there. Naicker then tried his luck at catching something and then he went back home. While there, a friend of his, Rakesh Chandra, had called him, and Naicker said that he went to Chandra's home to get a box of matches. He then returned to his own home, had a shower, had dinner, and then went out again. He claimed that it had been while he was out that he heard that someone had been murdered.

12. The latter part of this account was corroborated by Chandra who the prosecution called as a witness. At about 7.30 pm on the evening in question, he saw Naicker walking past his home. Naicker came in and asked Chandra for a box of matches. Chandra asked him where he had been, and Naicker said that he had been by the river fishing, although Naicker did not have any fishing tackle with him. When Chandra asked him whether he had caught anything, Naicker said that he had not.

The identification of Naicker by Naqaruqara and Draunimasi

13. Naqaruqara's evidence was that he had never seen the man before the evening in question. Nor does it look as if before the trial he had been asked to take part in an identification parade or another form of pre-trial identification procedure. If he had been, that would inevitably have emerged in the course of the trial, and it did not. We must therefore assume that no such parade or procedure had ever taken place. Despite that, he was asked if the man he had seen was in the courtroom. He said "yes" and pointed to Naicker. He explained that it had still been light, and that they had been face to face for 20 minutes. But this was still a dock identification, and I shall come later to the dangers of a dock identification of this kind.
14. The position was slightly different with Draunimasi. He was never asked whether he had seen the man before the evening in question, but no doubt if he had that would have emerged in his evidence. We must assume therefore that like Naqaruqara he had never seen the man before that evening. He was also asked if the man he had seen was in the

courtroom, and he too said “yes” and pointed to Naicker. Having been speaking to him face to face for 15 minutes, he said that he would be able to recognise the man again if he saw him. The difference in his case, though, was that he *did* attend an identification parade (at which Naicker was, I assume, one of the persons on the line-up), at which he identified someone else altogether as the man he claimed to have encountered on the evening in question. This was only three days later on 23 December. He claimed in his evidence that he had done that deliberately. The man who he had encountered *was* on the parade, but he did not pick that man out because he was scared. He had never attended an identification parade before, and he had confirmed all that in a further witness statement he had made to the police the same day after the police had told him that he had picked the “wrong” man. So Draunimasi’s identification of Naicker in court was also a dock identification, rendered even less reliable by the fact that he had failed to identify Naicker (albeit deliberately, he claimed) at an identification parade soon after the evening in question.

Naicker’s confessions

15. Naicker was twice examined by doctors before his first appearance in court. He was first examined by Dr Ilisapeci Lasaro in the morning of 23 December, three days after the evening in question. He was found to have abrasions on one of his hands and on some of his fingers which had healed, but which the doctor said were less than 5 days old. But importantly the doctor said that those abrasions were not consistent with what Naicker had said to her had happened. That was that he and Mishra had been arguing over rumours that Naicker had been having an affair with Mishra’s wife. Things had turned nasty, and Naicker had had to defend himself. In doing so, he had “unintentionally” stabbed Mishra several times in the neck. In the course of doing that, the fingertips on his left hand had got cut. As I understand the doctor’s evidence, she was saying that the only injuries she saw – the abrasions which had healed – were different from the cuts on the fingertips which you would expect to have seen if Naicker’s account had been true.

16. Naicker was interviewed by police officers while he was in custody. Eventually on the evening of 23 December, he made a statement in writing about what had happened. He said that while in the taxi with Mishra, Mishra had asked him if he was having an affair with his (Mishra's) wife. Naicker asked him where he had got his information from. Mishra did not tell him that, but pressed Naicker how long the affair had been going on for. Since the conversation was getting a bit heavy, they drove to a quieter location. Naicker told Mishra that his wife used to complain to him (Naicker) about how Mishra treated her, and as a result they used to speak on the phone and talk about the things which were troubling them in their lives. Mishra then asked Naicker how many times Naicker had had sex with his (Mishra's) wife. Naicker admitted that he had kissed and touched her, but that he had not had sex with her, presumably meaning full penetrative sex. The argument between them then got heated. Mishra got out of the taxi, and Naicker saw that he had a kitchen knife with him. Mishra grabbed Naicker by the collar and threatened to stab him with it. In trying to defend himself, Naicker managed to twist Mishra's hand (presumably the one with the knife), and it landed in Mishra's chest. He then proceeded to stab him several times in the chest. He then got into the taxi and drove off towards Korociriciri, throwing the knife away, but the taxi broke down after a short distance, and so Naicker got out of the taxi and ran off. He then found himself being chased by two men of Fijian ethnicity, who got hold of him and asked him why he was running away. He told them that "someone" had stabbed a taxi driver and that "they" had tried to rob him (Naicker) by taking some money from his wallet. They then left, and Naicker eventually made his way home.
17. Naicker's case at trial was that he had never confessed anything to the police. They had beaten him up, and forced him to sign the statement which they had written out. They were not his words at all. The police officers denied that. They said that Naicker willingly gave this statement, and that the account set in the statement was the account he gave. The admissibility of this statement, therefore, depended on facts which were in dispute, and the trial judge held a *voir dire* to resolve it. He found that Naicker *had* made the statement voluntarily, and accordingly he ruled that the statement was admissible in evidence.

18. In the interests of completeness, I should add that Naicker was examined by a second doctor, Dr Uphendra Singh, on the following day, 24 December. That was the routine examination of a defendant who had been charged with murder. Naicker had tenderness over his ribcage and muscle pain in his left thigh.

The grounds of appeal

19. The grounds of appeal have been very much a moving target. Naicker's notice of appeal to the Court of Appeal contained 10 grounds of appeal against conviction. Many of them overlapped, and ignoring one about the judge's notes (which I have not understood and has never been developed) they can be distilled into 5 separate grounds:
- The judge had refused to permit the police officers to be questioned in the trial proper about previous inconsistent statements made in the *voir dire*.
 - When ruling that Naicker's written statement was admissible, the judge had (i) failed to give sufficient weight to the evidence of Dr Singh (as well as another witness, Pastor Robert Ram, who had received a call from someone at the police station where Naicker was being questioned saying that Naicker had been assaulted), and (ii) had not handed down the written reasons for his ruling until after Naicker had been sentenced ("the *voir dire* ruling point").
 - The judge had failed to give the assessors any direction at all on the dangers of a dock identification and had not given an adequate direction to the assessors about their approach to disputed identification evidence ("the dock identification point").
 - The judge had failed to give the assessors any direction on "the absence of fingerprints and blood samples evidence, even though there was evidence led that the fingerprints and blood samples [at] the crime scene [were] taken" ("the forensic samples point").
 - The judge wrongly ruled that a proposed witness for the defence, Nilesch Kumar, could not give evidence on the basis that he was an alibi witness (for whom an alibi notice had not been given), when he was in truth not an alibi witness but one who merely corroborated the evidence of Rakesh Chandra.

The written submissions filed in support of the appeal to the Court of Appeal were different. Although they set out the 10 grounds of appeal referred to in the notice of appeal, only the grounds set out in the second and third of these bullet points were developed. None of the other ones were mentioned again. Nor were any of them addressed in the Court of Appeal's judgment. We take it that they must have been abandoned at some point. With one exception (being the forensic samples point), it was never submitted to the Supreme Court that the Court of Appeal had erred in failing to address these grounds of appeal. That left the grounds in the second and third bullet points, namely the *voir dire* ruling point and the dock identification point.

20. The *voir dire* ruling point was not addressed in the judgment of the Court of Appeal either. We were not told why that might have been. Presumably it was abandoned at the hearing itself. Again, there is no ground of appeal in the petition to the Supreme Court or in the written submissions for the Supreme Court that the Court of Appeal had erred in failing to address the *voir dire* ruling point. We can guess why that was. When granting leave to appeal to the Court of Appeal, the single judge said that the appeal was arguable "in general", but that the prosecution conceded that the dock identification point was arguable, while contending that the other grounds were devoid of merit. It looks, therefore, as if Naicker's legal team took the sensible tactical decision of concentrating their fire with their best point. Indeed, the Court of Appeal proceeded to address that point, ie the dock identification point.
21. That brings us to an oddity in the case. The main judgment in the Court of Appeal was given by Bandara JA, the other two members of the court agreeing with it. The judgment mainly addressed two questions: (i) whether the trial judge's summing-up to the assessors on how they should approach the circumstantial evidence was adequate, and (ii) whether the circumstantial evidence was sufficiently probative to justify the trial judge's finding of guilt. We can only assume that these were new grounds of appeal which were raised in oral submissions to the Court, and that was why the Court considered them. In the event, the Court thought that the directions which the trial judge gave to the assessors on the

topic were adequate, and that Naicker's guilt had been "proved beyond reasonable doubt on the circumstantial evidence".

22. I come, then, to the petition to the Supreme Court for special leave to appeal against conviction. It takes up the dock identification point. It also takes up the ball which the Court of Appeal ran with about the appropriate directions to the assessors on circumstantial evidence and its weight in this particular case ("the circumstantial evidence point"). It also seeks to resurrect the forensic samples point which it rightly contends the Court of Appeal did not address. And it seeks to raise a new point for the first time, namely that the trial judge should have ruled the evidence of Dr Singh inadmissible because his examination of Naicker occurred while Naicker was in police custody.
23. I can dispose of that last point quickly. I do not understand why the fact that Naicker was in police custody at the time of Dr Singh's examination of him should not be admissible. And when I looked at the written submissions in support of the petition, I could find nothing in them about that. Nor was the matter developed in oral argument on the hearing of the petition. In the circumstances, I shall respectfully put the point to one side. It may be that the wrong doctor was identified and that Naicker's legal team had Dr Lasaro in mind. But even if they had, I still do not understand how her evidence could have been inadmissible simply because her examination of Naicker took place while he was in custody.
24. In the course of his supplemental submissions filed on behalf of Naicker a couple of days before the hearing, Mr A K Singh took yet another point. The trial judge, he said, should have left the defence of self-defence to the assessors to consider and he should have considered that defence himself. So to summarise things, I propose to address the dock identification point, the circumstantial evidence point which is where the forensic samples point comes in, and the contention that the trial judge wrongly failed to consider the alternative defence of self-defence.

The dock identification point

25. The dangers of a dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognises him, but because the witness knows from where the defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to a dock identification, it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account.
26. A local authority for these propositions is the decision of the Court of Appeal in Lotawa v The State [2014] FJCA 186. At para 7 of his judgment, Madigan JA said:

“Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness – the person to be identified is sitting in the dock ... It has been decided now in a line of English cases that it should be refused by a trial judge except in situations where the accused has refused to participate on a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.”
27. A rare example of a dock identification being allowed was in Vulaca v The State [2011] FJCA 39. The Court of Appeal did not disapprove of it in that case because (i) the witness had seen the suspect twice before, on both occasions under good lighting, and (ii) there had been 8 defendants in the dock. But it is very different where the witness had only seen the suspect once before (albeit for much longer than a fleeting glimpse) and there was only one person in the dock. That was this case – provided that you ignore the

identification parade at which Draunimasi purported not to recognise Naicker, as you must.

28. The inescapable fact is that the prosecutor should not have asked Naqaruqara or Draunimasi whether the man they had seen was in the courtroom, but once the question had been asked, the judge should have intervened to tell the witness not to answer it and to explain to the assessors why he had intervened. But since that did not happen, it was incumbent on the judge to direct the assessors in the summing-up that they should ignore the identification in court of Naicker by Naqaruqara and Draunimasi and to explain why. All he did was to tell the assessors to “[c]onsider their evidence with great caution”. He did not say why, and since he told the assessors that immediately after he had reminded them of what had happened at the identification parade which Draunimasi had attended, the assessors may well have thought that the judge was only talking about that. Bandara JA acknowledged at para 34 of his judgment that there had been a failure on the part of the judge in respect of the dock identification, but went on to hold that no prejudice had been caused to Naicker as a result of it.
29. A related criticism is that the judge did not give the jury what has come to be known as a *Turnbull* direction – so named after the judgment of the English Court of Appeal in *R v Turnbull* [1977] QB 224. Where the case depends wholly or substantially on the correctness of someone’s identification of the defendant, *Turnbull* requires the judge (i) warn the assessors of the special need for caution before convicting on the basis of that evidence, (ii) to tell the assessors what the reason for that need is, (iii) to inform the assessors that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken, (iv) to direct the assessors to examine closely the circumstances in which each identification was made, (v) to remind the assessors of any specific weakness in the identification evidence, (vi) to remind the assessors (in a case where such a reminder is appropriate) that even in the case of the purported recognition by a witness of a close friend or relative, mistakes can occur, (vii) to specify for the assessors the evidence capable of supporting the identification evidence, and (viii) to identify the evidence which might appear to support the identification but does not in fact do so.

30. The judge did not give the assessors a direction along these lines, and the Court of Appeal did not consider whether he should have done. Of course, there should not have been a need for the judge to do so as the evidence of Naqaruqara and Draunimasi purporting to identify Naicker should never have been given, and once given the assessors should have been told to ignore it. But since the assessors were having to consider it, an appropriate *Turnbull* direction was essential. Part of what the judge would have had to say would have been damaging to the defence – namely the length of time the two witnesses were with the man they encountered, the fact that one of them had said that it was still light at the time, and the other had said that it was not yet dark. But the fact remains that no *Turnbull* direction was given.
31. These were serious irregularities in the trial. Whether Naicker's conviction can nevertheless be upheld in spite of them is something to which I shall return.

The circumstantial evidence point

32. Having explained to the assessors what direct evidence was, the direction which the judge proceeded to give to the assessors about circumstantial evidence was as follows:

“The other kind of evidence is circumstantial evidence that if, on consideration [of] a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation for the circumstances which is consistent with the accused's innocence, then you may convict the accused for the offence charged. Circumstantial evidence may be more powerful than direct evidence. Let me give an example:- If you one day find that your wallet is missing and the only person who could have entered your house is your neighbour, and you find your credit card is hidden in his desk in his home, then you are entitled to accept that it was your neighbour who stole your wallet. That is because the circumstances lead you to the only reasonable inference. However if other people have

access to your house and the credit card is not found in his house, then there are other possible explanations which are also consistent with his innocence.”

33. There is no prescribed form of direction when the prosecution’s case against the defendant is based on circumstantial evidence alone. So long as the judge gets the essence of it, that is sufficient. The essence of it is that the prosecution is relying on different pieces of evidence, none of which on their point directly to the defendant’s guilt, but when taken together leave no doubt about the defendant’s guilt because there is no reasonable explanation for them other than the defendant’s guilt. Although I may have used slightly different language from that which the judge used in this case, it sufficiently captured the essence of what the assessors had to be sure of before they were able to express the opinion that Naicker was guilty.
34. Mr Singh’s broad contention was that the Court of Appeal, which had used the analogy of strands of a rope, had been wrong to do so. Instead, it should have talked of links in a chain. That led Mr Singh to submit that there were a number of missing links in the chain in this particular case which had caused the chain to break which (a) the judge should have reminded the assessors about but which he did not, and (b) should have caused both the judge and the assessors to have a reasonable doubt about Naicker’s guilt. The argument falls at the first hurdle. The judge did not talk about the rope analogy at all! Bandara JA in the Court of Appeal did, but not the judge, and the true focus should be on what the judge said in his summing-up.
35. Leaving that aside, though, and concentrating on what the missing links in the chain were said to be, there were three of them according to Mr Singh: (i) the dock identifications which should never have been made, (ii) an important difference between what Naqaruqara had said in evidence and what he had said in his witness statement to the police before the trial, and (iii) the absence of fingerprints in the taxi, the absence of any evidence about any forensic examination of the blood samples taken from the taxi, and the absence of evidence about the knife or Naicker’s trousers being found.

36. As for (ii), Naqaruqara had said in his witness statement that what he had seen the man he was chasing throw away was a long kitchen knife. In his oral evidence in court, on the other hand, all he said was that he had seen the man throw something away. He did not say what it was, and does not appear to have been asked anything more about it. When he was cross-examined, one passage in his witness statement was put to him, but not this passage. So the assessors never knew that about what his statement had said on the topic. So if this was a missing link in the chain, it was not one which came out in the evidence, and it was therefore one which the trial judge could not tell the assessors about. But the important point is that this is not a missing link in the chain which somehow does not fit into the theory that it was Naicker who killed Mishra. It just means that the prosecution was not able to rely on a strand of the evidence which it would otherwise have relied on. That also explains why the reliance on (i) in this context is just as misconceived. The dock identifications were not a missing link in the chain. They were just features of the evidence which the prosecution should not have been allowed to rely on.
37. As for (iii), the point about the trousers not being found was a bad one. Draunimasi's evidence was that the man had put them on before he left. As for the fingerprints, the trial judge reminded the assessors in his summing-up that none had been found in the taxi. He also reminded them that samples of the blood found in the taxi were obtained for forensic examination. He did not remind the assessors that no evidence had been given whether those samples had been analysed, and if so, what the results of that analysis had been. Nor did he remind them that there had been no evidence about whether any knife had been searched for, and if so, found. But the assessors would have seen for themselves that no evidence had been called on those topics. They did not need the judge to remind them of that. In any event, absence of evidence is not evidence of absence. In other words, the absence of evidence of any forensic examination of the blood samples did not mean that they were not taken or that they were not analysed – in the same way that the absence of any evidence about a search for the knife did not mean that it was not looked for. It just means that for one reason or another, the court was not told whether they blood sample had been analysed or the knife looked for. Again, these are not missing links in the chain. It just means that the prosecution had fewer strands of evidence to rely on.

38. The critical question, therefore, is whether, ignoring the dock identifications of Naicker by Naqaruqara and Draunimasi which should not have been allowed, there was sufficient evidence – albeit of a circumstantial nature – on which the assessors *could* express the opinion that Naicker was guilty, and on which the judge *could* find Naicker guilty. In my opinion, there was. The unchallenged evidence was that he had been driven from the taxi base by Mishra in Mishra's taxi. If Naicker's account in his evidence was true, it meant that once Mishra had dropped him off, some unknown man had then killed Mishra and driven off in his taxi, and that it had been this unknown man with blood on his hands who had then been chased by Naqaruqara and Draunimasi – despite the evidence of Dr Lasaro and the police officers that Naicker had confessed to killing Naicker, albeit in self-defence. In these circumstances, it was open to the assessors and the judge to conclude that that this unknown man did not exist, and that the man who Naqaruqara and Draunimasi chased and caught was Naicker. In the absence of any explanation from Naicker about how Mishra came to die, and in view of (i) the pathologist's opinion that Mishra had been stabbed from behind, which could be said to be inconsistent with his attacker attacking him in self-defence, and (ii) the numerous stab wounds which could be said to be inconsistent with the notion that Naicker used no more force to defend himself than was reasonably necessary in the circumstances, it was open to the assessors and the judge to conclude that Naicker had killed Mishra in circumstances amounting to murder.

The defence of self-defence

39. The issue here is whether the issue of self-defence should have been left to the assessors and whether the judge should have considered it himself. Mr Singh did not develop the argument at all. He simply asserted that that was what the judge should have done. That has made our task less easy than it might otherwise have been, but we must do our best.
40. It needs to be noted that the defence did not ask the judge to leave the issue of self-defence. That was not necessarily negligence on the part of trial counsel. Such a defence was completely inconsistent, of course, with Naicker's defence at trial, which was that the death of Naicker had had nothing to do with him, and trial counsel may well have thought

that tactically it would be better if the alternative of self-defence was not considered. But the mere fact that the defence in a particular case does not want an alternative defence to be raised does not mean that it should not be: see Marsoof JA's compelling judgment in Praveen Ram v The State [2012] FJSC 12 in which the relevant authorities on the topic were reviewed. It all depends on whether such a defence arises on the evidence – or to be more precise, whether there is “a credible narrative of events suggesting the presence of” such a defence: see the decision of the Privy Council in Lee Chun Chuen v R [1963] AC 220.

41. The physical evidence does not suggest such a credible narrative of events for self-defence. The pathologist's opinion that Mishra was stabbed from behind, as well as the number of wounds he sustained, do not sit well with any notion that his attacker was acting in self-defence. The only suggestion that Naicker acted in self-defence was in his confessions to Dr Lasaro and the police. We do not know for sure whether the assessors found that Naicker had indeed said what Dr Lasaro and the police said he had, but the judge must have done so because he ruled in the *voir dire* that what Naicker had said to the police had not been beaten out of him and had been a voluntary confession on his part. And when convicting Naicker he referred in his judgment to the confessions in language which showed that he believed the confessions to have been made. So the question is whether Naicker's claim to Dr Lasaro and the police that he had acted in self-defence when Mishra had attacked him with a knife – a claim which he disavowed at trial by saying that there had been no violent encounter between him and Mishra at all – amounted to a credible narrative of events suggesting that he could have been acting in self-defence.
42. In that context, it is important to remember that what Naicker told Dr Lasaro and the police was both inculpatory and exculpatory. It was inculpatory in the sense that he admitted that Mishra had died in a violent encounter with him. It was exculpatory in the sense that Mishra's death had occurred while he, Naicker, was defending himself from attack. What is the evidential status of each? There is no problem with the inculpatory parts of what he said. They were a declaration against interest, and therefore constituted an exception to the rule against hearsay. The problem comes with the exculpatory, ie self-

serving, parts of what has been called a “mixed” statement of the kind we have here, namely a statement which contains material which amounts to an admission of one of the things which the prosecution seeks to prove – in this case, that Naicker had a violent encounter with Mishra of some kind – and a statement which purports to exonerate the defendant from guilt – in this case, Naicker’s claim that at all times he was acting in self-defence.

43. There have been two schools of thought about the evidential status of the exculpatory parts of a mixed statement. One is that they are not evidence of the truth of the facts to which the exculpatory parts relate: they are merely material which may be of use to the fact-finder when the defendant’s inculpatory statements are being evaluated. The other school of thought is that the whole of the statement is admissible as an exception to the rule against hearsay, and so the whole of the statement, including the self-serving parts of it are admissible as evidence of all the facts stated in it. The issue was settled by the decision of the House of Lords in *R v Sharp* [1988] 1 WLR 7. It decided that the latter approach was the correct one. Its decision applied to those cases in which the defendant, unlike Naicker, elected not to give evidence. But as Blackstone’s Criminal Practice 2016 stated at para F17.94, “there is no logical reason why the status of the statement should be any different if the accused testifies”. I agree with that.
44. The effect of that is that the evidential status of Naicker’s statement that he had been acting in self-defence is that it *was* evidence that he had indeed been acting in self-defence. But could it really be described as “a credible narrative of events suggesting” that he had really been acting in self-defence? I think not. It was a mere assertion (albeit one with the quality of evidence) which was not supported by other evidence. It was disavowed by Naicker in his evidence because of his denial that there had been a violent encounter with Mishra at all. It was inconsistent with the physical evidence that Mishra had been attacked from behind, as well as the number of stab wounds he received. And it would hardly have been a sure foundation for the assessors and then the judge to consider whether the force which Naicker on this hypothesis must have used to repel his attacker was no more than was reasonable in the circumstances which confronted him at the time,

an issue which would have had to be addressed if self-defence had been left to the assessors and had had to be considered by the judge. In the circumstances, I have concluded that the judge did not err in not leaving the issue of self-defence to the assessors or in not considering it himself.

The application of the proviso

45. I return to the irregularities in the trial as a result of the dock identifications and the absence of a *Turnbull* direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a “substantial miscarriage of justice” occurred? The Court of Appeal took the view that no prejudice had been caused to Naicker because the identification of him by Naqaruqara and Draunimasi were not as a result of a fleeting glimpse of him, but lasted in one case for about 15 minutes and in the other for about 20 minutes. The question, in my opinion, is whether the judge would have convicted Naicker of murder if there had been no dock identification of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge *could* have convicted Naicker without the dock identifications. The question now is whether he *would* have done so. I have concluded that, for the same reasons as I think that the judge *could* have convicted Naicker without the dock identifications, the judge *would* have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.

Correcting the judge’s summing-up

46. There is one final observation I should make. There has been much criticism of the judge’s summing-up in this case. Counsel for the State, Mr Andrew Jack, reminded us that trial counsel did not ask the judge at the end of the summing-up to correct anything he had said. The importance of counsel pointing out any errors which the judge may have made – respectfully but nevertheless firmly – was stressed by Gates P in *Raj v The State* [2014] FJSC 12 at para 35:

“The raising of direction matters ... is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client’s interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge.”

47. But what should the consequences be in a case such as the present one where counsel does not draw the judge’s attention to errors in the summing-up which could be exploited on appeal? The answer was given by Gates P in Raj at para 30 when he said that the “omission is in itself *usually* sufficient to disregard” the ground of appeal (emphasis supplied). So usually, not always, and that really only applied to those cases in which the omission had been deliberate with counsel sitting on their hands in order to preserve a point for the Court of Appeal.
48. The fact that the ground of appeal will usually be disregarded if the omission to draw the judge’s attention to it was *deliberate* was reiterated in Tuwai v The State [2016] FJSC 35. In her comprehensive judgment, Wati J considered the position when the omission had been deliberate. Having said that in such a case, the court’s approach has to be “stringent”, she added at para 101:

“Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then *in the absence of any cogent reason*, it should be held against that party as having employed a deliberate tactic to find an appeal point.” (Emphasis supplied)

Since no such reason had been advanced in that case, the court held that the appellant’s complaint that he had suffered a miscarriage of justice was “unacceptable”.

49. Some people think that the Supreme Court has recently gone further than that. At para 31 of his judgment in Alfaaz v The State [2018] FJSC 17, Hettige J said:

“In the present case the petitioner was asked by the trial judge whether he sought any redirection ... at the end of the summing-up it appears from the record that there was no reply given by the petitioner. This omission is in itself sufficient to disregard this ground of appeal in this court.”

As a result of that passage, it has been submitted, both in this appeal and in others in this session of the Supreme Court, that an omission to draw the judge’s attention at the end of the summing-up to errors later relied on in the appellate court will result in the ground of appeal being disregarded, *whether the omission was deliberate or not*. I do not agree. Alfaaz was a case in which the omission was found to be deliberate: as Hettige J said at para 27, it appeared that “the petitioner has done this deliberately to find an appeal point”.

50. So what should the position be where the omission was not deliberate but an oversight on the part of counsel? The answer suggested in Archbold’s Criminal Pleading Evidence and Practice 2018 at para 4-434 is as follows:

“... a failure to [draw the judge’s attention to an error in the summing-up] cannot of itself justify the dismissal of an appeal if there was an error or omission such as to render the conviction unsafe; but the failure of the defence advocate to draw the attention of the judge to the error may give rise to scepticism as to whether a correct direction would have made any difference.”

I agree with that observation. In the present case, we did not ask what the reason for the omission was, and in those circumstances it would not be right for us to assume that it was deliberate. It could just as well have been an oversight. On that footing, I have considered the grounds of appeal despite that omission.


Conclusion

51. For the reasons I have endeavoured to give, I do not think that Naicker's appeal has any real chance of success. It follows that no grave or substantial miscarriage might occur if leave to appeal was refused, and the case has not involved a question of general legal importance. It has merely involved the application of established legal principles to the facts of the case. Accordingly, I would refuse Naicker's application for special leave to appeal against his conviction.


Order of the Court:

Application for special leave to appeal against conviction refused.






Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court



Hon. Madam. Justice Chandra Ekanayake
Judge of the Supreme Court



Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

Solicitors:

Singh and Singh Lawyers for the Petitioner
 Office of the Director of Public Prosecutions for the Respondent.